IN THE SUPREME COURT OF MISSOURI

JAMES L. DRURY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Appeal No.: SC83901**
	)	
CITY OF CAPE GIRARDEAU, MISSOURI,	)	
	)	
	)	
Defendant.	)	

APPEAL FROM THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI
32nd JUDICIAL CIRCUIT
HON. ROBERT C. STILLWELL, JUDGE

SUBSTITUTE BRIEF OF RESPONDENTS, JAMES L. DRURY, ET AL.,

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ATTORNEYS FOR RESPONDENTS

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JURISDICTIONAL STATEMENT

Plaintiffs/respondents/cross-appellants James L. Drury and Midamerica Hotels Corporation adopt the Jurisdictional Statement of the appellant, City of Cape Girardeau, subject to the observation that the trial court failed to rule upon or otherwise dispose of a motion for summary judgment filed by plaintiffs in the trial court on May 23, 2000 (Legal File 168) asserting that the tax imposed by City Ordinance 2403 is a sales tax and as such, the words "sales tax" must appear in the title of the ordinance as mandated by Section 94.510 R.S.Mo. and which they do not. The defendant responded to the motion in the trial court on June 26, 2000 (Legal File 250). Thereafter, the issue was considered and preliminarily decided by the trial court in a draft of its judgment which the trial court circulated to the parties prior to its final decision. (LF 383).

However, no mention of this issue appeared in the trial court's judgment (LF 366).

Thus, the matter is not ripe for appeal. **Avidan v. Transit Cas. Co.**, 20 S.W.3d 521, 523 (Mo. banc 2000).

STATEMENT OF FACTS

The plaintiffs/respondents/cross-appellants, James L. Drury and Midamerica Hotels Corporation are referred to in this brief as "plaintiffs" (they are referred to as

"plaintiffs" throughout the substitute brief of the appellant, City of Cape Girardeau). Plaintiffs generally adopt the STATEMENT OF FACTS of the City (the defendant/appellant, City of Cape Girardeau, refers to itself as "City" throughout its substitute brief) except with regard to the following observations and comments.

In its STATEMENT OF FACTS, beginning at the bottom of page 8 of its substitute brief, the City describes and paraphrases its Ordinance 2403 and on page 9 thereof the City states as follows:

> "Ordinance 2403 amends section 15-397 of the City's Code of Ordinances by increasing . . .". (Emphasis added).

The use of the word "amends" is a substantial departure from what really occurred. This ordinance is set out in full in the LEGAL FILE of page 115 and also in the APPENDIX of the substitute brief of the City at A-1.

In Ordinance 2403 with regard to sec. 15-397 it is clearly stated beneath the quote of the ordinance then in effect that this present ordinance is:

> ". . . hereby repealed in its entirety and a new Section 15-397 entitled "Levy of Tax" is hereby enacted in lieu thereof, in words and figures, to read as follows: . . .". (Emphasis added).

This difference between "amends" and "hereby repealed" is important with regard to defendant's Point I.B., concerning whether Ordinance 2403 is exempt from the one-

subject and clear title requirements of City Charter Section 3.15 which excepts ordinances ". . . codifying or revising existing ordinances".

Beginning on page 12 of the "FACTS" of the substitute brief of the City, there is reference to a letter sent on March 30, 1984 from a former City Attorney of the City to one Robert Hendrix of the Cape Girardeau Chamber of Commerce. It is inserted apparently as some type of authority regarding the distinction between a sales tax and a gross receipts license tax. It is entirely self-serving and its purpose eludes us unless it is admissible under the "Ancient Document Rule".

It is difficult to determine how this seemingly personal correspondence (LEGAL FILE 206) has any relevance to or provides any authority for the dispute in this case regarding whether or not Section 15-397 of Ordinance 2403 is a sales tax or a gross receipts tax. However, we do approve of most of the statements in that letter. We just haven't caught on how it fits in this case.

There are other instances in the FACTS of the substitute brief of the City that are argumentative with two such instances appearing on page eighteen (18) of the "FACTS" of the City wherein the City includes citations of authority to bolster its assertions concerning the City Charter and a Missouri Statute, Section 94.110 R.S.Mo., and which would appear to be improper and highly out of place in that Civil Rule 84.04(c) provides that the statement of facts shall be, inter alia, ". . . without argument".

In addition to the selective portion of Ordinance 2403 which the plaintiff quotes

on page twelve (12) of its "FACTS" stating what is now "section 15-397 of the City Code", ARTICLE 7 of Ordinance 2403 also includes authority for the City to issue bonds to pay a portion of the costs of a performing arts project with Southeast Missouri State University and for which purpose the proceeds of the taxes authorized pursuant to ARTICLE 2 of the said Ordinance 2403 will be devoted.

The **JUDGMENT AND ORDER** of the trial court failed to address or dispose of the issue of whether or not Ordinance 2403 enacted a "sales tax" as opposed to a "gross receipts tax". This issue is the subject of a motion for summary judgment on behalf of plaintiffs (LF 168) filed May 23, 2000. The defendant responded on June 26, 2000. (LF 250) and the trial court preliminary decided the issue is favor of the plaintiffs in a draft brief (LF 383 at page 385) (Appendix to substitute brief of respondents as A-20) but no mention was made disposing of that motion either way in the trial court's "JUDGMENT AND ORDER". (LF 366). The City responds to this issue beginning upon page fifty-five (55) of its substitute brief.

RESPONSE TO "ARGUMENT" APPEARING UPON PAGE TWENTY-FOUR (24) OF THE BRIEF OF THE APPELLANT/CITY

Beginning on page twenty-four (24) of its substitute brief, the City has asserted an "**ARGUMENT**" which appears curious since it is not part of or pursuant to any "point relied on" but instead is from all appearances a plea to this court to reverse the trial court's judgment solely because:

> "[the trial court's] rationale (and that of the Missouri Court of

> Appeals in this case) would render invalid many municipal ordinances throughout this state as well as numerous state statutes".

This "**ARGUMENT**" goes on to state that:

> "Missouri has 36 charter cities, and no less than 25 of these have provisions virtually identical to Section 3.14 of Cape Girardeaus' (sic) Charter. The amicus brief explained that, if the court were to affirm the court below, the ruling would call into question the validity of countless ordinances already adopted by these municipalities. This prospect is especially troubling for local governments enacting complex legislation related to taxation and redevelopment, as is the case here. The court of appeals, however, ignored the amicus brief and the concerns it raised".

The several references to the Missouri Court of Appeals are obviously improper in accord with **Buchweiser v. Estate of Laberer**, 695 S.W.2d 125 (Mo. banc 1985). This case holds that a review of the case upon transfer from a court of appeals is taken as though the case was originally appealed to the Supreme Court. The authorities cited are **Mo. Const. Art. V, Section 10;** and Rule 83.03. Also, in accord with **Gerlach v. Missouri Commission on Human Rights**, 980 S.W.2d 589 (Mo. App. E.D. 1998), a

court of appeals decision has no precedential effect if the case is transferred.

However, of much greater significance, we feel, is this rather obvious attempt to "gang up" on the Supreme Court to urge it to essentially ignore the law in deference to the public interest argument of these groups.

Nowhere in the City's "**ARGUMENT**", is there any authority whatsoever for the bold statement that Missouri has thirty-six (36) charter cities and no less than twenty-five (25) have provisions virtually identical to Section 3.14 of Cape Girardeau's Charter, but even if this be the case, and these numerical figures are adopted as fact, then in order to be impressed by these arguments, this court would also have to assume, which is apparently what it is being asked to do, that these several charter cities with the provisions similar to those of the Cape Girardeau Charter are totally unaware or have ignored their respective charter provisions regarding the "clear title" and "single subject" provisions and that because of this case:

> ". . . the ruling would call into question the validity of countless ordinances already adopted by these municipalities".

Thereafter, the City goes farther and urges that state legislation would also be in peril including Missouri's two largest cities which have similar charter provisions.

Thus, the sequence of reasoning which is necessary in order to effectively ring the bell for the message which the City is trying to impose upon this Court would not only necessarily call for the conclusion that neither the Missouri General Assembly nor the

Cities of Kansas City and St. Louis or the many other municipalities having similar charter provisions are aware of the provisions under scrutiny, but also that they have learned nothing from the many cases which have been brought to the appellate level pursuant to these provisions and those under Article III, Section 23 of the Missouri Constitution.

It is difficult to swallow that St. Louis forgot about **ACI Plastics v. City of St. Louis**, 724 S.W.2d 513 (Mo. banc 1987) and in which case this court held an ordinance of the City of St. Louis invalid based on the "single subject" rule and which as discussed in this brief is identical to Article III, Section 23 of the Missouri Constitution and Section 3.14(a) of the Charter of the City of Cape Girardeau.

The political rush exhibited by this "**ARGUMENT**" would appear closely akin to the familiar premonition that "the sky is falling".

Also, to further attempt to intimidate this court with the projected dire effects which it is claimed would necessarily occur were the trial court in this case to be upheld, the City states as follows:

> "If the Court were to declare Ordinance 2403 invalid for the reasons set forth by the plaintiffs, the floodgates would be open to similar challenges to a host of other enactments, with possible ramifications for millions of Missouri citizens. The Court should reject the plaintiffs' claims because they are meritless, and also because of the ill effects that a contrary

> ruling would have on this state". (This quote comes from page twenty-five (25) of the "ARGUMENT" in the City's substitute brief).

With this above quoted prediction that the ". . . floodgates would be opened to similar challenges . . .with possible ramifications for millions of Missouri citizens". We wonder why the previous cases including **ACI Plastics v. City of St. Louis**, *supra*, did not also cause the "floodgates" to open. We are given no statistics or even one example of any such rippling effect as a result of **ACI Plastics**, *supra*, and it seems safe to assume that in fact there were no such effects.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT/APPELLANT, CITY OF CAPE GIRARDEAU HEREINAFTER "CITY" UPON COUNT III OF THE PLAINTIFFS' PETITION IN THAT COUNT III OF THE PLAINTIFFS' PETITION ALLEGED THAT ORDINANCE 2465 AND THE AGREEMENT ATTACHED TO THE ORDINANCE CREATED AN INDEBTEDNESS ON THE PART OF THE CITY TO SOUTHEAST MISSOURI STATE UNIVERSITY THAT COULD ONLY BE VALIDLY ENACTED BY AN APPROVAL OF A FOUR-SEVENTHS (4/7THS) MAJORITY OF VOTERS PURSUANT TO ARTICLE VI, SECTION 26(b) OF THE CONSTITUTION OF 1945 WHICH WAS NOT DONE AS NO ELECTION WHATSOEVER WAS HELD. THE TRIAL COURT ERRED BY ERRONEOUSLY HOLDING THAT THERE WAS NO "INDEBTEDNESS" ON THE BASIS THAT THE PAYMENTS TO BE MADE BY THE CITY TO SOUTHEAST MISSOURI STATE UNIVERSITY WERE CONTINGENT AS THEY ARE CONDITIONED UPON ANNUAL APPROPRIATIONS BY THE CITY COUNCIL.

Article VI, Section 26(b) of the Constitution of the State of Missouri of 1945

Grand River Tp., Dekalb County v. Cooke Sales & Service, Inc., 267 S.W.2d 322 (Mo. 1954)

Ordinance No. 2465 of the City of Cape Girardeau, Missouri

POINT II

THE TRIAL COURT WAS CORRECT IN ENTERING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND DECLARING ORDINANCE 2403 VOID AS THE TITLE OF THIS ORDINANCE CLEARLY VIOLATED SECTION 3.14(a) OF THE CITY CHARTER IN FAILING TO INCLUDE IN THE TITLE OF THE ORDINANCE THE MANY SUBJECTS AND PARTICULARS THAT ARE INCLUDED IN ORDINANCE 2403 AS REQUIRED BY SECTION 3.14(a) OF THE CITY CHARTER.

THIS POINT ADDRESSES OUR CONTENTION THAT THE TITLE OF ORDINANCE 2403 VIOLATES "CLEAR TITLE" PORTION OF SECTION 3.14(a) OF THE CITY CHARTER. THAT IS, THE TITLE OF THE ORDINANCE MUST CONTAIN THE SUBJECTS AND PARTICULARS OF THE ORDINANCE CLEARLY EXPRESSED IN ITS TITLE. THIS ARGUMENT DOES NOT ADDRESS THE OTHER MANDATE OF SECTION 3.14(a) OF THE CITY CHARTER THAT AN ORDINANCE CANNOT HAVE MORE THAN ONE SUBJECT. THIS IS DISCUSSED IN POINT III.

Article III, Section 23 of the Constitution of the State of Missouri 1945

Article IV, Section 13, of the Charter of the City of St. Louis, Missouri

Adams v. City of St. Louis, 563 S.W.2d 771 (Mo. 1978)

508 Chestnut, Inc. v. City of St. Louis, 389 S.W.2d 823 (Mo. 1965)

State ex rel. Childress v. Anderson, 865 S.W.2d 384, 387 (Mo. App. 1993)

State ex rel. Fire Dist. of Lemay v. Smith, 353 Mo. 807, 184 S.W.2d 593, 596 (1945)

Section 3.14(a) of the Charter of the City of Cape Girardeau, Missouri

Ordinance No. 2403 of the City of Cape Girardeau, Missouri

POINT III

THE TRIAL COURT WAS CORRECT IN DECLARING ORDINANCE 2403 VOID IN THAT THIS ORDINANCE INCLUDES A ". . .MULTIPLICITY OF SUBJECTS. . ." AS FOUND BY THE TRIAL COURT THE ORDINANCE VIOLATES THE "ONE SUBJECT" RULE AS REQUIRED BY ARTICLE 3.14(a) OF THE CHARTER OF THE CITY OF CAPE GIRARDEAU, MISSOURI.

Article III, Section 23 of the Constitution of the State of Missouri 1945

ACI Plastics, Inc. v. City of St. Louis, 724 S.W.2d 513 (Mo. banc 1987)

Adams v. City of St. Louis, 563 S.W.2d 771

508 Chestnut, Inc. vs. City of St. Louis, 389 S.W.2d 823 (Mo. 1965)

Hammerschmidt v. Boone County, 877 S.W.2d 98, 102, column 2 (Mo. banc 1994)

Section 3.14(a) of the Charter of the City of Cape Girardeau, Missouri

Article IV, Section 13 of the Charter of the City of St. Louis, Missouri

Ordinance No. 2403 of the City of Cape Girardeau, Missouri

POINT IV

THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY

JUDGMENT TO THE PLAINTIFFS ON COUNT V OF THEIR PETITION. THE DEFENDANT, CITY, ARGUES IN PART B (PAGE 27) OF ITS BRIEF THAT ORDINANCE 2403 IS NOT GOVERNED BY CHARTER SECTION 3.14(a) REQUIRING THAT ORDINANCES HAVE ONLY ONE SUBJECT CLEARLY EXPRESSED IN THE TITLE TO THE ORDINANCE BECAUSE ORDINANCE 2403 IS MERELY AN "AMENDMENT" OF AN ORDINANCE WHICH IS SYNONYMOUS WITH "REVISION" AND THIS ORDINANCE THEREFORE COMES WITHIN AN EXCEPTION TO THE ORDINANCE REQUIREMENTS UNDER CHARTER SECTION 3.14(a) FOR ORDINANCES THAT ARE ONLY CODIFICATIONS OR REVISION. (1) ORDINANCE 2403 STATES THAT IT "REPEALS" AN EXISTING ORDINANCE AND ENACTS A "NEW" ORDINANCE AND THEREFORE THE NEW ORDINANCE IS NEITHER A "REVISION" OR AN "AMENDMENT". (2) CONTRARY TO THE DEFENDANT'S ARGUMENTS, ORDINANCE 2403 IS NOT MERELY A REVISION OF AN EXISTING ORDINANCE AND IN THE CONTEXT OF SECTION 3.14(a) "REVISION" AND "AMENDMENT" OF AN ORDINANCE ARE NOT SYNONYMOUS.

Kansas City v. Travelers Insurance Company, 284 S.W.2d 874 (Mo. App. 1955)

Pollard v. Board of Police Commissioners, 665 S.W.2d 333 (Mo. banc 1984)

Protection Mutual Insurance Company vs. Kansas City, 504 S.W.2d 127 (Mo. 1974)

Section 3.14(a) of the City Charter of the City of Cape Girardeau

Section 3.18 of the Charter of the City of Cape Girardeau, Missouri

Ordinance No. 2403 of the City of Cape Girardeau, Missouri

Section 15-397 of Ordinance 2403 of the City of Cape Girardeau, Missouri

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POINT V

THE DEFENDANT ASSERTS IN POINT II OF ITS SUBSTITUTE BRIEF, (PAGE 23) (PAGE 59), THAT THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFFS PURSUANT TO COUNT V OF THE PLAINTIFFS FIRST AMENDED PETITION WHEREIN THE TRIAL COURT VOIDED ORDINANCE 2403. THE CITY ARGUES THAT THERE WAS NO

SHOWING BY PLAINTIFFS TO NEGATE AN AFFIRMATIVE DEFENSE OF ESTOPPEL. THE DEFENDANT'S ASSERTION OF ESTOPPEL IS BASED SOLELY ON A LETTER FROM THE PLAINTIFFS TO THE MAYOR OF CAPE GIRARDEAU (LF 276) BUT THERE IS NO SHOWING THAT THERE WAS ANY RELIANCE THEREON TO CONSTITUTE ESTOPPEL. HOWEVER, EVEN IF THE LETTER COULD AS A MATTER OF LAW CONSTITUTE "ESTOPPEL" AS A DEFENSE, THERE NECESSARILY REMAINS A FACT QUESTION UN-DISPOSED OF AND A RETURN TO THE TRIAL COURT IS NECESSARY TO DETERMINE IF THERE WAS IN FACT RELIANCE BY THE CITY.

Avidan v. Transit Cas. Co., 20 S.W.2d 521 (Mo. banc 2000)

Fulton v. City of Lockwood, 269 S.W.2d (Mo. 1954)

McCain v. Washington, 990 S.W.2d 685, 869 (Mo. App. 1999)

Tinch v. State Farm Insurance Co., 16 S.W.3d 747, 751 (Mo. App. E.D. 2000)

Rule 55.08

Ordinance No. 2403 of the City of Cape Girardeau, Missouri

POINT VI

THE TRIAL COURT ERRED IN FAILING TO RULE UPON THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST ORDINANCE 2403 OF THE CITY OF CAPE GIRARDEAU, MISSOURI BASED UPON THE PLAINTIFFS' CONTENTION THAT ORDINANCE 2403 IMPOSED A SALES TAX AND AS SUCH, WAS REQUIRED TO INCLUDE THE TERM "SALES TAX" IN THE ORDINANCE AND AS A RESULT, THE ORDINANCE IS VOID SINCE SECTION 94.510 R.S.MO. REQUIRES THE INCLUSION OF THE TERM "SALES TAX" WITHIN THE ORDINANCE.

ACI Plastics, Inc. vs. City of St. Louis, 724 S.W.2d 513 (Mo. banc 1987)

Anderson v. City of Joplin, 646 S.W.2d 727 (Mo. 1983)

Landoll by Landoll v. Dovell, 799 S.W.2d 621, 627 (Mo. App. 1989)

Suzy's Bar & Grill, Inc. vs Kansas City, 580 S.W.2d 259 (Mo. banc 1979)

Section 94.510 R.S.Mo.

Rule 84.04

Ordinance No. 2403 of the City of Cape Girardeau, Missouri

Section 15-397 of Ordinance 2403 of the City of Cape Girardeau, Missouri

POINT VII

THE DEFENDANT ERRONEOUSLY CONTENDS IN SECTION E OF ITS SUPPLEMENTAL BRIEF ON PAGE FORTY-SIX (46) THAT PLAINTIFFS CANNOT PREVAIL ON THEIR CLAIM THAT THE ELECTION HELD TO APPROVE ORDINANCE 2403 IS INVALID. THE GIST OF THE DEFENDANT'S ARGUMENT SEEMS TO BE THAT EVEN IF THE PLAINTIFFS' ARGUMENT REGARDING THE FAILURE OF ORDINANCE 2403 TO ABIDE BY THE PROVISIONS OF CHARTER SECTION 3.14(a) CONCERNING THE CLEAR TITLE AND SINGLE SUBJECT REQUIREMENTS IS UPHELD IN THIS APPEAL AS IT WAS IN THE TRIAL COURT, THAT THE ORDINANCE SHOULD BE SEVERED AND THOSE PROVISIONS RELATING TO THE TAX AND THE ELECTION PROVIDED FOR IN THE TITLE OF THE ORDINANCE SHOULD BE UPHELD.

THIS IS APPARENTLY BASED ON SECTION 115.577 R.S.MO. THAT AN ELECTION CONTEST MUST BE BROUGHT WITHIN THIRTY (30) DAYS AFTER THE OFFICIAL ANNOUNCEMENT OF THE ELECTION RESULT TO NEGATE AN ELECTION. SUCH IS NOT THE CASE IN THIS SITUATION AS THE ELECTION AND THE ORDINANCE TITLE AND THE OTHER PROVISIONS THEREOF ARE DEPENDENT UPON ONE AND THE OTHER AND A VOID ORDINANCE NEGATES THE ELECTION EVEN IF THE ELECTION IS MENTIONED IN THE TITLE.

Levinson v. City of Kansas City, 43 S.W.3d 312 (Mo. App. 2001)

Section 115.577 R.S.Mo.

Ordinance 2403 of the City of Cape Girardeau, Missouri

Section 3.14 of the City Charter of the City of Cape Girardeau, Missouri

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POINT VIII

THE DEFENDANT HAS IN ITS SUBSTITUTE BRIEF IN SECTION 3. OF POINT RELIED ON I AN ARGUMENT (PAGE 42) ENTITLED "THE OPINION OF THE COURT OF APPEALS WAS ERRONEOUS". THIS IS AN IMPROPER ARGUMENT TO BE INCLUDED BY THE DEFENDANT IN ITS BRIEF AS THE OPINION OF THE MISSOURI COURT OF APPEALS HAS NO PRECEDENTIAL AUTHORITY SINCE AN APPEAL TO THIS COURT UPON TRANSFER IS TAKEN AS IF ORIGINALLY APPEALED TO THIS COURT.

Mo. Const. Art. V, Section 10

Buchweiser v. Estate of Laberer, 695 S.W.2d 125 (Mo. banc 1985)

Gerlach v. Missouri Commission on Human Rights, 980 S.W.2d 589 (Mo. App. E.D. 1998)

Rule 83.03

POINT I

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT/APPELLANT, CITY OF CAPE GIRARDEAU HEREINAFTER "CITY" UPON COUNT III OF THE PLAINTIFFS' PETITION IN THAT COUNT III OF THE PLAINTIFFS' PETITION ALLEGED THAT ORDINANCE 2465 AND THE AGREEMENT ATTACHED TO THE ORDINANCE CREATED AN INDEBTEDNESS ON THE PART OF THE CITY TO SOUTHEAST MISSOURI STATE UNIVERSITY THAT COULD ONLY BE VALIDLY ENACTED BY AN APPROVAL OF A FOUR-SEVENTHS (4/7THS) MAJORITY OF VOTERS PURSUANT TO ARTICLE VI, SECTION 26(b) OF THE CONSTITUTION OF 1945 WHICH WAS NOT DONE AS NO ELECTION WHATSOEVER WAS HELD. THE TRIAL COURT ERRED BY ERRONEOUSLY HOLDING THAT THERE WAS NO "INDEBTEDNESS" ON THE BASIS THAT THE PAYMENTS TO BE MADE BY THE CITY TO SOUTHEAST MISSOURI STATE UNIVERSITY WERE

CONTINGENT AS THEY ARE CONDITIONED UPON ANNUAL APPROPRIATIONS BY THE CITY COUNCIL.

Ordinance 2465, a copy of which is included in the Appendix to this substitute brief of respondents at A-7 and also in the Legal File at page 135 was passed on December 21, 1998 and this Ordinance 2465 authorizes the City Manager to execute a Cooperation Agreement between the City and University. (LF at 135 and City's Facts at page 15). We also include a copy of this particular agreement and also Ordinance No. 2465 to Appendix to this substitute brief of respondents as A-1 through A-9.

Paragraph 3 of the above mentioned Cooperation Agreement set out the obligation of the City as follows:

> "3. In consideration of the issuance of the University Obligations, the City agrees that, from and after the issuance of the University Obligations and subject to annual appropriation by the City Council, it will transfer to the University (a) the proceeds of the additional 1% Hotel/Motel Tax imposed from January 1, 1999 through October 31, 2004, plus (b) all of the proceeds of the Hotel/Motel Tax and the Restaurant Tax imposed from November 1, 2004 through December 31, 2030, less (c) any costs associated with the normal annual operations of the City's Convention and

Visitor's Bureau as determined by the City Council (currently approximately $350,000 per year)."

The City argues that because the phrase "and subject to annual appropriations by the City Council" in paragraph 3, that there is no "indebtedness" on the part of the City with regard to this agreement with the University and instead, it is conditional or optional and therefore, does not amount to an indebtedness which by the terms of Const. Art. VI §26(b) requires a four-sevenths (4/7ths) vote.

Obviously, even without more, this agreement clearly reflects the intended obligation and undertaking of the City to devote the proceeds of the tax in question to the University project which is the subject of the agreement. If there was no obligation on the part of the City and its participation was truly conditional or optional on its part then of course there would be no immediate "indebtedness" which is the subject of the Const. Art. VI §26(b).

However, paragraph 5 of the very same agreement provides as follows:

"<u>The City agrees, to the fullest extent permitted by law</u> (emphasis ours) that (a) the City will continue to levy the Hotel/Motel Tax and the Restaurant Tax, (b) the City will not submit any proposition to the voters of the City to amend, repeal or reduce the Hotel/Motel Tax or the Restaurant Tax nor to cause the Hotel/Motel Tax or the Restaurant Tax to

expire prior to the expiration dates established in Ordinance No. 2403, and (c) the City will not permit the proceeds of the Hotel/Motel Tax or the Restaurant Tax to be applied for any purpose not expressly set forth in this Agreement." (Appendix to substitute brief of respondents as A-2 through A-9).

Article VI, Section 26(b) of the Constitution of the State of Missouri of 1945 and as amended in 1988 is as follows:

"§26(b) Limitation on indebtedness of local government authorized by poplar vote

Any county, city, (emphasis ours) incorporated town or village or other political corporation or subdivision of the state, BY VOTE OF THE QUALIFIED ELECTORS THEREOF VOTING THEREON, MAY BECOME INDEBTED IN AN AMOUNT (emphasis ours) not to exceed five percent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of the qualified electors voting thereon may become indebted in an amount not to exceed then percent of the value of such taxable tangible property. FOR ELECTIONS REFERRED TO IN THIS SECTION

> THE VOTE REQUIRED SHALL BE FOUR-SEVENTHS (4/7THS) AT THE general municipal election day, primary OR GENERAL ELECTIONS (emphasis ours) and two-thirds at all other elections."

The City argues on page 44 of its substitute brief that because of the wording "subject to annual appropriation by the City Council" in paragraph 3 of the agreement no such election is required by Art. VI §26(b). However, in accord with **Grand River Tp., DeKalb County v. Cooke Sales & Service, Inc.**, 267 S.W.2d 322 (Mo. 1954) the Supreme Court of Missouri held that Section 26(b) of Article VI of the Missouri Constitution applies to contractual obligations as well as to bonded indebtedness.

The reason that the ordinance provision regarding annual appropriation by the City Council is in the agreement is obviously not to make it merely an optional program which the City may or may not participate as it desires. This is strongly illustrated in a later portion of the agreement (paragraph 5) after the "annual appropriation" phrase in paragraph 3, where it is provided that the City binds itself that it ". . . will not permit the proceeds of the Hotel/Motel Tax or the Restaurant Tax to be applied for any purpose not expressly set forth in this Agreement." (Emphasis ours). This is in addition to the earlier quoted provision from paragraph five (5) that the City will comply with the agreement ". . . to the fullest extent permitted by law." (Emphasis ours).

By this paragraph 5, the City is locked in tight.

There is no indication or doubt whatsoever but that the City is extending its credit to this project for many millions of dollars and it intends to be and is bound.

As a result, the City has, by the above mentioned agreement and Ordinance No. 2465 bound and obligated itself with the University to provide the proceeds of the tax as called for therein to satisfy the bond indebtedness ". . . to the fullest extent permitted by law, . . .".

This agreement and the ordinance (No. 2465) should be declared void for the failure to comply with Art.VI §26(b) of the Constitution of Missouri of 1945 to submit this agreement to a vote of the electors and to obtain at least a four-sevenths (4/7ths) majority, depending upon the type of election during which the measure is submitted in accord with the above cited constitutional provision.

WHEREFORE, the grant of summary judgment by the trial court to the City upon its determination as reflected in its "**JUDGMENT AND ORDER**" of October 4, 2000 (LF 372) should be reversed and summary judgment should be granted to plaintiffs as moved for in the trial court by the plaintiffs in their motion for summary judgment on this point beginning at page eighty-eight (88) of the Legal File.

POINT II

ARGUMENT

THE TRIAL COURT WAS CORRECT IN ENTERING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND DECLARING ORDINANCE 2403 VOID AS THE TITLE OF THIS ORDINANCE CLEARLY VIOLATED SECTION 3.14(a) OF THE CITY CHARTER IN FAILING TO INCLUDE IN THE TITLE OF THE ORDINANCE THE MANY SUBJECTS AND PARTICULARS THAT ARE INCLUDED IN ORDINANCE 2403 AS REQUIRED BY SECTION 3.14(a) OF THE

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THIS POINT ADDRESSES OUR CONTENTION THAT THE TITLE OF ORDINANCE 2403 VIOLATES "CLEAR TITLE" PORTION OF SECTION 3.14(a) OF THE CITY CHARTER. THAT IS, THE TITLE OF THE ORDINANCE MUST CONTAIN THE SUBJECTS AND PARTICULARS OF THE ORDINANCE CLEARLY EXPRESSED IN ITS TITLE. THIS ARGUMENT DOES NOT ADDRESS THE OTHER MANDATE OF SECTION 3.14(a) OF THE CITY CHARTER THAT AN ORDINANCE CANNOT HAVE MORE THAN ONE SUBJECT. THIS IS DISCUSSED IN POINT III.

A copy of Ordinance 2403 appears as "A-1" to the defendant's substitute brief, page 115 of the Legal File and we also include in the Appendix to substitute brief of respondent as A-10 though A-13, a copy of the full Ordinance 2403.

The title of Ordinance 2403 is as follows:

> "AN ORDINANCE AMENDING CHAPTER 15 OF THE CITY CODE INCREASING AND EXTENDING THE HOTEL/MOTEL/RESTAURANT LICENSE TAX AND CALLING AN ELECTION IN THE CITY OF CAPE GIRARDEAU, MISSOURI, ON THE QUESTION OF WHETHER TO APPROVE THOSE AMENDMENTS; DESIGNATING THE TIME OF HOLDING THE

ELECTION; AUTHORIZING AND DIRECTING THE CITY CLERK TO GIVE NOTICE OF THE ELECTION".

Contrary to the trial court's finding, the City argues that Ordinance 2403 does not violate Section 3.14(a) of the City Charter because "ALL OF THE MATTERS IN ORDINANCE 2403 RELATE TO THE SAME SUBJECT OF AN INCREASE AND EXTENSION OF A LICENSE TAX AND THE TITLE OF THE ORDINANCE CLEARLY EXPRESSES THE SUBJECT".

The trial court found that the ordinance title excludes any mention of the ". . . multiplicity of subjects tied to the enactment" with no mention of those many other subjects being made in the title.

Section 3.14(a) of the Charter of the City of Cape Girardeau is as follows:

> "No ordinance except those making appropriations of money and those codifying or revising existing ordinances shall contain more than one (1) subject, <u>which shall be clearly expressed in its title</u>. Ordinances making appropriations shall be confined to the subject matter of the appropriations." (Emphasis ours). (Appendix to substitute brief of respondents as A-19).

In this instances, the precise wording of the City Charter which we think has been violated with regard to the title of Ordinance 2403 is underlined as follows:

"Section 3.14(a)

No ordinance . . . shall contain more than one (1) subject, which shall be clearly expressed in its title. . .".

Again, this motion is not directed to the excessive or prohibited number of subjects in the ordinance also under Charter Section 3.14(a) but instead, is focused on the fact that the subjects and particulars of the ordinance are not expressed in the title of the ordinance.

The best discussion of this area is in **508 Chestnut, Inc. v. City of St. Louis**, 389 S.W.2d 823 (Mo. 1965).

1. The **Chestnut** case, *supra*, in column 2 on page 828 of the decision, gives us the following important lesson with regard to this situation and it is as follows:

"Article IV, Section 13, Charter of the City of St. Louis provides, inter alia, no Bill . . . shall contain more than one subject, which shall be clearly expressed in its title".

2. The Supreme Court in deciding **Chestnut** further tells us in column 2 on page 828 of the decision in referring to the previous quote from the Charter of the City of St. Louis regarding the clear expression of the subject of an ordinance in its title:

"This is substantially the same as Art. III, Section 23, Mo. Const. 1945 which applies to bills introduced in the General Assembly".

3. The principles which have been applied in the construction of Art. III, Section 23 are fully applicable to similar provisions in the Charter of the City of St. Louis as also stated in column 2 of page 828 of the **Chestnut** decision.

4. The **Chestnut** court further tells us in column 1 on page 829 of the opinion as follows:

> "The title may be expressed in a few words, but where it descends to particulars the particulars stated become the subject of the act, which must conform to the title as expressed by the particulars. Where the title goes into such detail as would reasonably lead to the belief that nothing was included except that which is specified then any matter not specified it not within the title. Any such matter beyond the title is void. . .". Citing **State ex rel. Fire Dist. of Lemay v. Smith**, 353 Mo. 807, 184 S.W.2d 593, 596 (1945).

5. The Supreme Court further states in the **Chestnut** case that:

> "The object of the requirement is that 'the title, like a guideboard, indicate the general contents of the bill, and contain but one general subject, which might be expressed in a few or a greater number of words.' (Authorities cited) The evil to be avoided is imposition upon the members of the

> legislature and interested people. By requiring an 'honest' title-one which is not designated as a cover-the legislators will not be misled into overlooking or carelessly or unintentionally voting for vicious and incongruous legislation, and interested people will be notified of the subjects of legislation being considered in order to have an opportunity to be heard thereon."

This holding is essentially a corollary to the well known legal maxim "Expressio unius exclusio alterius", meaning that the expression of some, is the exclusion of others. This quote is referred to as a fundamental rule of construction in **Hannibal v. Minor**, 224 S.W.2d 598 (Mo. 1949).

The legal issue is as follows:

A. Whether the various items enumerated hereunder come within the scope of the **Chestnut** case, *supra*, and which states that if the title to an ordinance goes into such particulars that it would lead one to conclude that those were the subjects of the ordinance and that there was nothing in the ordinance except as specified in the title, then any particulars in the ordinance but not specified in the title are void.

B. We restate the title of Ordinance 2403 as follows:

"AN ORDINANCE AMENDING CHAPTER 15 OF THE

CITY CODE INCREASING AND EXTENDING THE HOTEL/MOTEL/RESTAURANT LICENSE TAX AND CALLING AN ELECTION IN THE CITY OF CAPE GIRARDEAU, MISSOURI, ON THE QUESTION OF WHETHER TO APPROVE THOSE AMENDMENTS; DESIGNATING THE TIME OF HOLDING THE ELECTION; AUTHORIZING AND DIRECTING THE CITY CLERK TO GIVE NOTICE OF THE ELECTION". (LF 115).

6. The subjects or particulars included in the text of Ordinance 2403 are:

1. The repeal of a license tax levy ordinance; (Art. 2)

2. The enactment of a new license tax levy; (Art. 2)

3. An increase in a license tax on hotels; (Art. 2)

4. An increase in a license tax on motels; (Art. 2)

5. An extension of license taxes on both hotels, motels and restaurants; (Art. 2)

6. ORDINANCE NO. 2403 further provides that the City will devote the proceeds of the hotel/motel and restaurant tax for paying a portion of, acquiring, constructing, furnishing and equipping a performing arts center, museum, and an associated cultured facility for the city of Cape Girardeau

and Southeast Missouri State University to be located at the University's River Campus; (Art. 7)

7. ORDINANCE NO. 2403 further provides and authorizes a city bond issue by stating that the tax proceeds will be used to pay principal and interest on bonds to be issued by the City of Cape Girardeau for the purpose of paying a portion of the cost of acquiring, constructing, furnishing and equipping a performing arts center as set out in "Article 7" of said ORDINANCE NO. 2403; (Art. 7)

8. The ordinance (2403) further authorizes the City to enter into an intergovernmental cooperation agreement with Southeast Missouri State University for the establishment of a Board of Managers to provide guidance for the construction of the above mentioned performing arts center project; (Art. 7)

9. The ordinance (2403) contains an emergency clause for the calling of an election allegedly pursuant to Section 3.15(D) of the City Charter. (Art. 9)

Since the title to the ordinance (Ordinance No. 2403) mentions particularly that it is an ordinance amending Chapter 15 of the City Code by increasing and extending the hotel/motel/restaurant license tax and calling an election, a person reading this title would then be justified in assuming that in fact those expressed particulars were all of the subjects (or the single subject) of the ordinance. To put it another way, there is no way

that anybody reading the title to this act would suspect that Ordinance 2403 also includes authorization for a bond issue, a co-operative agreement with the University for the City to pay millions of dollars to the University, the authorization of a museum and cultural center to be paid for by the city tax but owned by the University or any or all of the other subjects actually contained in the ordinance but not mentioned in the title.

The title of Ordinance 2403 tells us only that it is increasing and extending a tax, and that it is calling an election on the question of whether or not to approve those provisions. The title tells no more than that and it does not indicate or even hint in the title that there is anything further. However, as enumerated above, there are several important, expansive and crucial questions, subjects and topics in that ordinance such as the University project itself, the City's involvement and obligation to pay for a portion of it, a bond issue by the City of Cape Girardeau for 8.9 million dollars (A-15) and the use of the tax to pay for the bonds to be issued by the City for the University project and none of which are in no way indicated in the title to Ordinance 2403. All the title does is describe a tax increase and extension. Should the City be told it is going in the hole for $8.9 million dollars plus interest.

It is simply quite difficult to express how far afield the ordinance in question is from the charter requirement that the subject or subjects be clearly set out in the title.

It might be argued that it is somewhat of a fiction that anyone or a city councilman would depend on the title of an ordinance to determine the provisions of the ordinance

itself. This, however, is not far fetched at all. People serving on a city council are for the most part laymen and not used to reading matters of this type and most ordinances are, for the most part, tedious at best.

We think that in this particular situation, more reliance than usual might easily have been placed upon the title of the ordinance since, in reviewing the journal of the proceedings for the meeting of August 17, 1998 (A-15 to this brief) at which this ordinance was passed as an emergency (Bill 98-166) measure and scooted through at one (1) meeting, the journal recites that all three (3) of the readings were given at that one (1) meeting at which at least fifteen (15) other ordinances were in one way or the other considered and since this was characterized as an "emergency matter", it was introduced, read and passed all at the same meeting. Thus there was no time between the meetings for a careful reading of the ordinance by the council members.

Importantly, according to the journal (LF 326), the ordinance itself was not read to the City Council but instead, only the title was read. This situation provides much more reasoning and wisdom for the rule that all of the parts and subjects of an ordinance must be contained in its title. All of the circumstances are present at this particular hasty situation for the title of an ordinance to be relied upon more than usual and all the more need for a clear title. (Emphasis ours).

With regard to the journal proceedings, Ordinance 2403 (Bill 98-166) was passed on August 17, 1998, we attach a copy of those journal proceedings as pages A-14 through

A-17 in the Appendix to this substitute brief of respondents and we call the court's attention to the minutes for Bill 98-166 (Ordinance 2403) with regard to the following

1. **Importantly**, only the title to the ordinance was read and not the entire ordinance, even though this was a new ordinance as confirmed hereunder. (A-15)
2. That Bill No. 98-166 declared to be Ordinance No. 2403 at the conclusion of the discussion of that bill at the top of the second page of the minutes was given three readings at the same time. (A-15) (A-16)
3. All of the three readings of the ordinance were approved at that time. (A-15)
4. In the third paragraph of those minutes of August 17, 1998 (A-15) with regard to Bill No. 98-166, it is revealed that the ordinance presented that night was in fact a new ordinance and not the one that was proposed at a previous Council meeting.

The City attempts to argue that all of the various particulars or subjects which we have referred to are merely logical extensions of or are included within the increase in the hotel/motel/restaurant tax and its extension. This is, of course, a matter for the court as it was for the trial court, but if it can be said that those many particulars and subjects contained in Ordinance 2403 are in fact nothing more than

logical extensions of a tax increase, then the question would be, "What is not a logical extension of a tax increase?". In accord with the City's reasoning, there would be no restrictions whatsoever and everything would necessarily follow a tax increase including an unrevealed indebtedness of $8.9 million dollars plus that much in interest.

We wish to call the court's attention to the gravity of the City Charter provisions and in accord with **State ex rel. Childress v. Anderson**, 865 S.W.2d 384, 387 (Mo. App. 1993), "the home rule charter is the city's organtic law and its Constitution. (Emphasis ours).

Furthermore, it is held in **Burks v. City of Licking**, 980 S.W.2d 109 (Mo. App. 1998) that courts generally follow a strict rule of construction when determining the powers of municipalities.

Thus, Section 3.14(a) of the Charter of the City of Cape Girardeau is in essence the "Constitution" of the City and should be strictly construed.

Finally, in accord with **Adams v. City of St. Louis**, 563 S.W.2d 771 (Mo. 1978) decided by the Supreme Court of the State of Missouri, it was held in column 1 on page 775 of the **Adams** opinion that:

"Because the ordinance is a taxing measure,

> a strict interpretation of its terms is required. It is to be construed against the taxing authority and in favor of the taxpayer," citing numerous authorities.

The Missouri Municipal League cites **Fust vs. Attorney General for the State of Missouri**, 947 S.W.2d 424 (Mo. banc 1997) and which restates the established rule that the subject of a title to a bill may be so restrictive that a particular provision is rejected because it falls outside the scope of the subject. In our situation, the only subject in the title is a tax increase and extension without any mention, expressed or by implication, that numerous other matters are in the bill.

CONCLUSION

For the reasons set out above, the trial court correctly determined that Ordinance 2403 failed to include within its title the many particulars necessary to comply with Section 3.14(a) of the City Charter of Cape Girardeau and as a result, Ordinance 2403 is void and the ruling of the trial court should be upheld.

POINT III

ARGUMENT

THE TRIAL COURT WAS CORRECT IN DECLARING ORDINANCE 2403

VOID IN THAT THIS ORDINANCE INCLUDES A ". . .MULTIPLICITY OF SUBJECTS. . ." AS FOUND BY THE TRIAL COURT THE ORDINANCE VIOLATES THE "ONE SUBJECT" RULE AS REQUIRED BY ARTICLE 3.14(a) OF THE CHARTER OF THE CITY OF CAPE GIRARDEAU, MISSOURI.

Section 3.14(a) of the Charter of the City of Cape Girardeau is in part as follows (LF 130):

> "No ordinance except those making appropriations of money and those codifying or revising existing ordinances shall contain more than one (1) subject, which shall be clearly expressed in its title. Ordinances making appropriations shall be confined to the subject matter of the appropriations." (Emphasis ours).

The numerous subjects which the plaintiffs contend are in Ordinance 2403 are as follows:

1. The repeal of a license tax levy ordinance; (Art. 2)
2. The enactment of a new license tax levy; (Art. 2)
3. An increase in a license tax on hotels; (Art. 2)
4. An increase in a license tax on motels; (Art. 2)
5. An extension of license taxes on both hotels, motels and restaurants; (Art. 2)
6. ORDINANCE NO. 2403 further provides that the City will

devote the proceeds of the hotel/motel and restaurant tax for paying a portion of, acquiring, constructing, furnishing and equipping a performing arts center, museum, and an associated cultured facility for the city of Cape Girardeau and Southeast Missouri State University to be located at the University's River Campus; (Art. 7)

7. ORDINANCE NO. 2403 further provides and authorizes that the tax proceeds will be used to pay principal and interest on bonds to be issued by the City of Cape Girardeau for the purpose of paying a portion of the cost of acquiring, constructing, furnishing and equipping a performing arts center as set out in "Article 7" of said ORDINANCE NO. 2403; (Art. 7)

8. The ordinance (2403) further authorizes the City to enter into an intergovernmental cooperation agreement with Southeast Missouri State University for the establishment of a Board of Managers to provide guidance for the construction of the above mentioned performing arts center project; (Art. 7)

The trial court found in its "**JUDGMENT AND ORDER**" that the ordinance contained a ". . . multiplicity of subjects. . .". (LF 372).

With reference to Section 3.14(a) of the Charter of the City of Cape Girardeau quoted above, there can be only one subject in an ordinance. The defendant wants to tell us that all of those various provisions and objectives are just continuations of the increase and extension of the tax and hence not separate "subjects", but even a casual reading of Ordinance 2403 leaves little or no doubt but that increasing a tax by one percent (1%) and having an election to approve the increase as stated in the title of the ordinance hardly encompasses or naturally flows to the authorization of the City of Cape Girardeau to enter into an agreement with Southeast Missouri State University for all of the tax proceeds to be devoted to an entirely new project to be owned by the University and further, that bonds shall be issued by the City for that project to cover the $8.9 million dollar bond issue for the new project all of which sum shall come from the City plus interest of at least that much.

In order for those provisions cited above not to be "subjects" so as to render the ordinance invalid for multiple subjects, they must all ". . . fairly relate to the same subject, having a natural connection therewith or are incidents or means to accomplish its purpose". This quote comes from **Hammerschmidt v. Boone County**, 877 S.W.2d 98, 102, column 2 (Mo.

banc 1994).

In order to pass the test just cited, all of the matters or "subjects" that are in the ordinance other than the tax increase and extension must all be "matters that fall within or reasonably relate to the general core purpose of the proposed legislation". This quote also comes from column 2 on page 102 of the **Hammerschmidt** opinion, *supra*.

The City may urge that the purpose of the tax is the financing of the University project, and thus related. But such is not the case here because the University project is not the subject of this ordinance. It is not even mentioned in the title of the ordinance. That is, if the main subject of the bill was the new cultural center project and its financing, then the increase and the extension of the tax would more nearly follow that subject. However, such is not the case in our situation. In this case, the only subject as expressed in the title of the ordinance itself is an increase and extension of the tax and an election to approve this increase and extension. Nothing is mentioned in the title about the cultural center project or the bond issue or the agreement with the University.

These provisions concerning “one subject” are not merely a play on words.

In **ACI Plastics, Inc. v. City of St. Louis**, 724 S.W.2d 513

(Mo. banc 1987), it is held in column two on page 516 of the opinion under note 3 that:

> "The challenged ordinance is invalid because it contained more than one subject in violation of the City's charter."

The sentence prior to the previous quote was as follows:

> "The sales tax and the employer's fee are completely different subjects.".

On this basis, as mentioned, the city ordinance of the City of St. Louis in question was held to be "invalid".

In this cited case, **ACI Plastics, Inc.**, *supra*, the main case authority cited by the Supreme Court of Missouri for declaring the St. Louis ordinance invalid because it contained more than one subject in violation in the City's charter is **508 Chestnut, Inc. v. City of St. Louis**, 389 S.W.2d 823 (Mo. 1965).

This case (**508 Chestnut**) was also decided by the Supreme Court of Missouri and it provides the history for the provisions under consideration concerning the single subject requirement of ordinances and the clear expression **of the subject** in the title.

Specifically, in column 2 on page 828 of the **508 Chestnut, Inc.**, *supra*, it is stated that Article IV, Section 13 of the Charter of the City of St. Louis provides:

> "No Bill . . . shall contain more than one

> subject, which shall be clearly expressed in its title". This is substantially the same as Art. III, Section 23, Mo. Const. 1945 which applies to bills introduced in the General Assembly. The principles which have been applied in the construction of Art. III, Section 23 are fully applicable."

The Court will please note that the provision from the St. Louis City Charter as above described is identical in content with that provision of Section 3.14(a) of the Charter of the City of Cape Girardeau which also requires that an ordinance shall not contain more than one subject and which shall be clearly expressed in its title.

Thus, reviewing just a few of what the plaintiffs contend to be separate subjects in the ordinance, the hotel/motel tax is sought to be increased from three percent (3%) to four percent (4%). This same tax is sought to be extended until December 31, 2030. Also included in the ordinance is another tax, a license tax on restaurants which is also extended from the present expiration date until December 31, 2030. In accord with **ACI Plastics, Inc. v. St. Louis**, *supra*, we will recall that in that case an ordinance from the City of St. Louis was held invalid because it presented more than one subject. The two subjects

which were found to contravene the charter provision in question were a "gross receipts tax" and also a "special employer's fee". As mentioned, both of these matters within the same ordinance violated the charter provision and rendered the ordinance "invalid".

In our situation, we have a tax on hotels and motels and also a tax on restaurants. The tax on hotels and motels is increased and also its term is extended. With regard to restaurants, its rate is not increased, but its term is extended. These are separate subjects in themselves.

As previously noted, there are many other subjects in Ordinance 2403, as previously discussed, which will not in any single instance, much less in all instances pass the test of **Hammerschmidt v. Boone County**, 877 S.W.2d 98 (Mo. banc 1994) which requires that matters that do not naturally flow from the subject of the ordinance are separate subjects. In the **Hammerschmidt** case, in column 2 on page 102, the Supreme Court held as follows:

> "To the extent the bill's original purpose is properly expressed in the title to the bill, we need not look beyond the title to determine the bill's subject".

Thus, we look to the title of ORDINANCE NO. 2403 and we see

that the only matters are the hotel/motel/restaurant license tax and the calling of an election. Nothing else is stated, and as just quoted, this (the title) is where we should look for the bill's subject.

The title of ORDINANCE NO. 2403 is as follows:

> "AN ORDINANCE AMENDING CHAPTER 15 OF THE CITY CODE INCREASING AND EXTENDING THE HOTEL/MOTEL/RESTAURANT LICENSE TAX AND CALLING AN ELECTION IN THE CITY OF CAPE GIRARDEAU, MISSOURI, ON THE QUESTION OF WHETHER TO APPROVE THOSE AMENDMENTS; DESIGNATING THE TIME OF HOLDING THE ELECTION; AUTHORIZING AND DIRECTING THE CITY CLERK TO GIVE NOTICE OF THE ELECTION".

Then, knowing the subject of the ordinance to be the hotel/motel/restaurant tax amendment and extension and an election for this purpose, as that subject is expressed in the ordinance itself, and in accordance with the requirements of **Hammerschmidt**, we review the body of the ordinance to see if it is limited to the subject expressed in the title. Lo, and behold, we run into the authorization of the City of Cape Girardeau to participate in a university project along with Southeast Missouri State University to acquire, construct,

furnish and equip a performing arts center, a museum and associated cultural facilities to be located at the University's River Campus. Please note also the scant mention tucked into page three (3) of ORDINANCE NO. 2403 which is in the official birth of that substantial project as far as the City of Cape Girardeau is concerned. It is a huge step and in the failed ordinance, ORDINANCE NO. 2403, bonds were sought to be issued by the City of Cape Girardeau in the amount of Eight Million Nine Hundred Thousand Dollars ($8,900,000.00) for those various costs just cited. [Of which no mention was made in the title of the ordinance]. The City intends not only to retire those bonds, but of course to pay the interest and other expenses as stated in the Ordinance 2403. This goes to an astronomical sum and yet, for some reason, it is not considered by the City to be significant enough to be a "subject" to cause it to be considered in a separate ordinance, or even mentioned in the title of the ordinance.

A project of many millions of dollars cannot in any stretch of the imagination be held to have a natural connection with the small tax increase and extension mentioned in the title of the ordinance (2403) as its subject. The tax increase could have been sought for general revenue purposes only, without any special project or cooperation agreement with the University.

We look first to the title of the bill to find its purpose according to the **Hammerschmidt** case, *supra*, and we then look to the other matters in the ordinance to see if they accomplish that purpose. In no way can the cultural center project be said to accomplish the purpose of a tax increase. It is not necessary to any tax increase that it be spent on a particular project or for a particular purpose . This is truly the cart before the horse in a classic sense. It violates the provisions of 3.14(a) of the City Charter, and on its own invalidates the ordinance.

As previously mentioned, it would come more nearly, but still not nearly enough, complying with the charter provision concerning the "one (1) subject" limit for ordinances by mentioning only the University project in the title of Ordinance 2403 since, in accord with the **Hammerschmidt** case, different provisions or objectives are not necessarily separate subjects in an ordinance if they flow or naturally occur as a result of the main subject itself. Thus, if the University cultural center project was the main subject then it would more nearly make sense that the ability to pay for it would be a natural progression. However, we have the opposite. We have a tax increase but certainly a huge project with the University can in no stretch of the imagination said to naturally flow from the

tax. It is a huge undertaking. In the ordinance in question, not only did this vast project not receive top billing (as far as the title is concerned), it received no billing at all. In any event, anything of this size and this expense to the City of Cape Girardeau cannot be considered as anything but a "subject" as far as ordinances are concerned under Section 3.14(a) of the City Charter.

Thereafter, in the ordinance, a bond issue is given parameters and conditions and additionally, the City is also given the power to enter into an agreement with Southeast Missouri State University to manage the performing arts center. Again, under the **Hammerschmidt** analysis, the title of the ordinance (ORDINANCE NO. 2403) tells us only that the hotel/motel and restaurant tax will be increased and extended. That is therefore the subject of the ordinance and these other matters just mentioned, such as the agreement with the University and the bond issue are not means to accomplish this subject since the subject of the bill is a tax increase and you don't need to have a bond issue to have a tax increase, nor do you need to undertake a project with the University and pay for it to have a tax increase, nor do you have to have a cooperative agreement with the University in order to accomplish a tax increase. Again, it is all backward.

No matter how you look at it, this ordinance is full with diverse "subjects".

As Judge Blackmar says in his concurring opinion in the **ACI Plastics, Inc.** case, *supra*:

> "The holding that the challenged ordinance submitted to the voters 'is invalid because it contained more than one subject in violation of the City's charter' is sufficient to decide the case. We simply cannot tell whether the voters would have approved both of the revenue measures, if they had been submitted separately."
>
> (Emphasis ours).

Thus, Section 3.14(a) of the Charter of the City of Cape Girardeau speaks in distinct terms regarding the "one subject" situation as does the Missouri Constitution, Article III, Section 23 and the Charter of the City of St. Louis, Article IV, Section 13 and from which **ACI Plastics, Inc.** *supra*, is decided.

On the state level with regard to state statutes, the **Hammerschmidt** case, *supra*, held that the constitutional provision requiring only one subject in a bill to be mandatory and that a violation rendered the statute invalid just as **ACI Plastics, Inc.**, *supra*, which held that city ordinances having a

"one subject" provisions as does Cape Girardeau in Section 3.14(a) of the Charter.

We have made frequent reference to Article III, §23 of the Constitution of the State of Missouri and also Charter Article IV, §13 of the Charter of the City of St. Louis. The Charter provision of the City of St. Louis regarding "one subject" and Article 3.14(a) of the Charter of the City of Cape Girardeau concerning "one subject" are identical in meaning and virtually identical, if not identical, in wording. In the **508 Chestnut** case, the Supreme Court of Missouri held that the "one subject" provision of the Constitution of the State of Missouri was applicable to the Charter provision of the City of St. Louis because they are "substantially the same". The decisions and principles concerning Article III, §23 of the Constitution are therefore applicable to the provisions of the Charter of the City of St. Louis. All of those decisions would then be applicable to Section 3.14(a) of the Charter of the City of Cape Girardeau since it is identical with the Charter of the City of St. Louis.

There is no reason why Ordinance 2403 of the City of Cape Girardeau can survive because of: (1) the many subjects contained in the ordinance, and (2) the lack of the expression of those subjects in the title. This is what is required by

Section 3.14(a) of the Charter of the City of Cape Girardeau and it has been completely ignored.

Finally, with regard to the interpretation of ordinances constituting revenue measures, it was held by the Missouri Supreme Court in 1978 in **Adams v. City of St. Louis**, 563 S.W.2d 771, at the top of column 1 on page 775 of the opinion by the Missouri Supreme Court En Banc., that:

> "Because the ordinance in a taxing measure, a strict interpretation of its terms is required. It is to be construed against the taxing authority and in favor of the taxpayer". (Several authorities are cited).

As a result of the above, the plaintiffs are entitled to summary judgment and matters set out herein.

We also call the court's attention to the gravity of the City Charter provisions and in accord with **State ex rel. Childress v. Anderson**, 865 S.W.2d 384, 387 (Mo. App. 1993), ". . .the home rule charter is the city's organtic law and its constitution. (Emphasis ours).

Thus, Section 3.14 of the Charter of the City of Cape Girardeau is in essence its "Constitution" of the City and should be strictly construed.

Furthermore, it is held in **Burks v. City of Licking**, 980

S.W.2d 109 (Mo. App. 1998) that courts generally follow a strict rule of construction when determining the powers of municipalities.

CONCLUSION

For the reasons stated above, the trial court was correct in voiding Ordinance 2403 because of its failure to abide by Section 3.14(a) of the Charter of the City of Cape Girardeau.

POINT IV

ARGUMENT

THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFFS ON COUNT V OF THEIR PETITION. THE DEFENDANT, CITY, ARGUES IN PART B (PAGE 27) OF ITS BRIEF THAT ORDINANCE 2403 IS NOT GOVERNED BY CHARTER SECTION 3.14(a) REQUIRING THAT ORDINANCES HAVE ONLY ONE SUBJECT CLEARLY EXPRESSED IN THE TITLE

TO THE ORDINANCE BECAUSE ORDINANCE 2403 IS MERELY AN “AMENDMENT” OF AN ORDINANCE WHICH IS SYNONYMOUS WITH “REVISION” AND THIS ORDINANCE THEREFORE COMES WITHIN AN EXCEPTION TO THE ORDINANCE REQUIREMENTS UNDER CHARTER SECTION 3.14(a) FOR ORDINANCES THAT ARE ONLY CODIFICATIONS OR REVISION. (1) ORDINANCE 2403 STATES THAT IT “REPEALS” AN EXISTING ORDINANCE AND ENACTS A “NEW” ORDINANCE AND THEREFORE THE NEW ORDINANCE IS NEITHER A “REVISION” OR AN “AMENDMENT”. (2) CONTRARY TO THE DEFENDANT’S ARGUMENTS, ORDINANCE 2403 IS NOT MERELY A REVISION OF AN EXISTING ORDINANCE AND IN THE CONTEXT OF SECTION 3.14(a) “REVISION” AND “AMENDMENT” OF AN ORDINANCE ARE NOT SYNONYMOUS.

Section 3.14(a) of the City Charter of the City of Cape Girardeau with the “exception language” relied upon by the City being emphasized is as follows:

> "No ordinance <u>except those making appropriations of money and those codifying or revising existing ordinances</u> shall contain more than one (1) subject, which shall be clearly expressed in its title. Ordinances making appropriations shall be confined to the subject matter of the appropriations." (Emphasis ours). (LF 130)

The above quoted provision from the City Charter contains

the "one (1) subject rule" for ordinances and also the clear title requirements. It also contains the exception (underlined) upon which the City wishes to rely in urging that Ordinance 2403 is not subject to the “one subject” and “clear title” requirements of City Charter Section 3.14(a) by contending that ORDINANCE NO. 2403 (Appendix A-10) is in fact just a “revision” of an existing ordinance. However, the ordinance itself in its title says it is an amendment and doesn’t mention either in the title or anywhere in the ordinance itself the word “revision”. The City attempts to get around this situation by arguing that “amendment” and “revision” are synonyms and therefore Ordinance 2403 is exempt from Section 3.14(a) since it is an amendment which is the same as a revision as used in the Charter Section.

These plaintiffs' contend that the term "revision" and, of course, "revising" as used in the language of the Charter provision have to do only with numbering and positioning of ordinances and codifying them but not amending them.

Before embarking upon the task of illustrating to this court that the term “revising” as used in Section 3.14(a) of the City Charter is not synonymous with or interchangeable with “amendment” as used in the title to Ordinance 2403 so as to bring the ordinance in question (Ordinance 2403) within the exception with regard to merely revising ordinances, plaintiffs

feel a short cut to end this entire controversy is within the ordinance itself. That is, the City contends that Ordinance 2403, although referred to as an amendment in its title is the same as a "revision" in order to bring it within the "revising" exemption of Section 3.14(a) of the City Charter. However, in reviewing this ordinance, the insistence that the ordinance is merely an "amendment" in the first place is somewhat specious since, although the term "amending" appears in the title of the ordinance with reference to the fact that it is "AMENDING CHAPTER 15 OF THE CITY CODE". The ordinance then tells us that the present provisions imposing the tax (Sec. 15-397) are not in any way "amended" but are in accord with the clear wording of ARTICLE 2:

> ". . .(Sec. 15-397) is hereby repealed (emphasis ours) in its entirety and a new (emphasis ours) Section 15-397 entitled 'levy of tax' is hereby enacted in lieu thereof, in words and figures, to read as follows:".

Thus, there is no amendment of the subject matter of the ordinance as stated in the title regarding increasing and extending the tax. The existing tax ordinance was "repealed" and a "new" Section 15-397 was enacted.

Thus, the portion of the ordinance pertaining to the subject as stated in the title which is the tax on hotels, motels and restaurants is a repeal of an ordinance and the enactment of a “new” Section 15-397. It is not an amendment.

Thus, this “repeal” can in no way bring what is clearly done by the terms of the ordinance in repealing an existing tax provision and enacting a new tax provision within the exception to Section 3.14(a) of the City Charter which imposes ordinance requirements except when there is “codifying or revising existing ordinances”. A “repeal” is clearly much more than merely revising an ordinance and certainly more than amending an ordinance since the substantive portions of the ordinance clearly point out that rather than an amendment, the taxing provisions are repealed an new provisions are enacted.

Hopefully, this will put an end to the defendant’s argument regarding whether or not the exception to Section 3.14(a) of the City Charter fits this situation since “revision” and “amendment” are synonymous. In the previous arguments set out in this point, we have attempted to show that the ordinance in fact does not either revise or amend anything but instead repeals and enacts a new section and hence, there has been no amendment upon which to base the argument of the City that “revision” as used in the Charter Section 3.14(a) is synonymous

with “amendment”.

In addition to the arguments set out above and which we trust will be dispositive of the defendant’s argument that Ordinance 2403 is exempt from the clear title and one subject provisions of Section 3.14(a), we continue with this point to show the court that “revision” as used in the exception portion of Section 3.14(a) is not synonymous with “amendment” and therefore does not provide an “out” for the defendant to remove Ordinance 2403 from the requirements of Charter Section 3.14(a) regarding the single subject and clear title requirements.

There are separate and distinct reasons why the words “revising” and “amendment” are not synonymous in the context they are used in the Section 3.14(a) of the City Charter and in Ordinance 2403.

In Charter Section 3.14(a), ordinances are exempt from its requirements regarding “one subject” and “clear title” if they are “. . . codifying or revising existing ordinances. . .”. In this context “codifying” and “revising”, since they are used together must be considered comparably and consistently in meaning as is the obvious intent of the ordinance.

The well recognized rule of construction “noscitur a sociis” was fashioned or developed for this very type situation. That is, we (plaintiffs) believe that the word “revising” as

used in the exception portion of Section 3.14(a) of the City Charter should be defined in conformity with the immediate previous word “codifying” rather than giving “revising” a far different and greatly expanded meaning to that of being synonymous or interchangeable with “amendment”.

The exception in Section 3.14(a) first mentions “codifying” and then “revising” separated only by the conjunction “or”.

“Codifying” means to “classify” or systemize or, importantly, reduce to a code (emphasis ours) according to Webster’s New Collegiate Dictionary. Consistent with this meaning for “codifying”, “revising” should be assigned the meaning as restructuring or changing in order or renumbering to assist in the codification such as the codification of statutes into a code.

The words “codify” and “amend” have nothing in common but “codify” and “revise” certainly do.

To consider “amend” in the context in which “codifying” and “revising” appear in Section 3.14(a) would be a violation of “noscitur a sociis”.

“Noscitur a sociis” has been judicially defined as “. . . a word is known by the company it keeps”, **Pollard v. Board of Police Commissioners**, 665 S.W.2d 333 (Mo. banc 1984) in foot note 13. If a word is capable of many meanings then this theory

is utilized ". . . to avoid the giving of unintended breath" (emphasis ours).

Thus, as used in Section 3.14(a) of the City Charter, the use of the words "codifying" and "revising" obviously is intended to apply to the process during which ordinances are placed in a code and those two words work well together in that context.

To take the defendant's argument that "revising" should mean "amending" would be to go far afield of the intended meaning and common sense.

To put our argument in question form, "How would it make sense under Section 3.14(a) to require that the title of an ordinance state the particulars or subjects of an ordinance unless it is an amendment?". Certainly, the title to the amended or new portions of an amended ordinance would be as important as the original title of the ordinance being amended.

It would make no sense whatsoever and be completely illogical to hold that the requirements of Section 3.14(a) of the City Charter that an ordinance may only have one subject and a clear title would not apply to an amended ordinance, but that is exactly what the City argues when it says an amended ordinance of the City of Cape Girardeau is not subject to the requirements and restrictions of Section 3.14(a) because

“amendment” and “revision” are synonymous even though “revising” in Section 3.14(a) is used in context with “codifying”.

To further explain or illustrate that the word “revising” and the word “amending” are not synonymous and cannot be used interchangeably with regard to Section 3.14(a) of the City Charter, we call the Court's attention to Section 3.18 of the City Charter of Cape Girardeau which is entitled "Codification of Ordinances".

This particular section is as follows:

> "At intervals as the council may determine, all ordinances and resolutions having the force and effect of law shall be revised, codified and promulgated according to a system of continuous numbering and revision as specified by ordinance." (Emphasis ours). (App. A-18 to substitute brief of respondents).

The Court will please note that the term "amendment" is not used and reading this particular section makes it obvious that the term "revised" means to provide for a system of continuous numbering of ordinances and certainly not changing the text of the ordinances or amending them. Importantly, the words “revised” and “revision” are used in context with “codification

of ordinances” which is the title of the charter section and two versions of the word “revising” are in the text of the Charter Section 3.18. There is no reference to amending ordinances.

Also, with regard to the Charter provision under consideration in Section 3.14(a), the term "amendment" is nowhere within the particular exception on which the defendant relies and the sole basis of the exception is confirmed to “. . .codifying or revision” ordinances.

In **Kansas City v. Travelers Insurance Company**, 284 S.W.2d 874 (Mo. App. 1955), it is held in column 1 on page 878 of the opinion under note (3) that a "Revision Committee" (emphasis ours) had no power to alter the sense, meaning, or effect of any legislative act and that it was merely to compile and arrange the various statutory enactments. "It had no legislative authority". Thus “revision” means the opposite of “amendment” in this context as it should in Section 3.14(a) of the Charter.

Furthermore, under note (4) in column 1 on page 878 of the opinion, the distinction between a "revision" and an "amendment" is clearly illustrated by the following language:

> "Consequently, we must construe this section as it appeared in the various revisions from 1919 until 1949, since there were no legislative amendments or changes during

that period of time". (Emphasis ours).

Thus, again, it is clear that with regard to legislative acts, "revision" means to number, compile or whatever. "Amendment" means to change. They are in no way synonymous and with regard to legislative enactments, they are almost diametrically opposed as these authorities point out and they are certainly distinct.

Another case illustrating the difference in the meaning of the word "revised" as opposed to a legislative act such as an "amendment" is found in **Protection Mutual Insurance Company vs. Kansas City**, 504 S.W.2d 127 (Mo. 1974) and it is stated in the first line of column 2 on page 130 of that opinion as follows:

> "Absent a legislative act amending the section, statute revisors have no authority to change the substantive meaning and application of a law or its purpose and intent, and any subsequent revision purporting to effect such a substantive change is ineffective for that purpose".

Therefore, people who revise statutes cannot amend or change statutes. The words “revise” and “modify” have far different meanings as they should with regard to Charter Section 3.14(a).

We trust it is clear to the Court that a revision of a legislative act and an amendment of a legislative act are totally different and obviously, in no way synonymous with one and the other and therefore, the term "revising" in the provision of City Charter Section 3.14(a) does not exempt amended statutes and does not supply an exception in this situation to the "one (1) subject rule" or the “clear title” requirements of Section 3.14(a) as the City contends for its ordinance to escape the requirements of Section 3.14(a) of the City Charter.

With regard to the above, the argument of the City that Ordinance 2403 is exempt from the requirements of Section 3.14(a) of the City Charter because it is an “amendment” and hence a “revision” of an ordinance is without merit and merely an attempt at a play on words.

_____

POINT V

ARGUMENT

THE DEFENDANT ASSERTS IN POINT II OF ITS SUBSTITUTE BRIEF, (PAGE 23) (PAGE 59), THAT THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFFS PURSUANT TO COUNT V OF THE PLAINTIFFS FIRST AMENDED PETITION WHEREIN THE TRIAL COURT VOIDED ORDINANCE 2403. THE CITY ARGUES THAT THERE WAS NO SHOWING BY PLAINTIFFS TO NEGATE AN AFFIRMATIVE DEFENSE OF ESTOPPEL. THE DEFENDANT'S ASSERTION OF ESTOPPEL IS BASED SOLELY ON A LETTER FROM THE PLAINTIFFS TO THE MAYOR OF CAPE GIRARDEAU (LF 276) BUT THERE IS NO SHOWING THAT THERE WAS ANY RELIANCE THEREON TO CONSTITUTE ESTOPPEL. HOWEVER, EVEN IF THE LETTER COULD AS A MATTER OF LAW CONSTITUTE "ESTOPPEL" AS A DEFENSE, THERE NECESSARILY REMAINS A FACT QUESTION UN-DISPOSED OF AND A RETURN TO THE TRIAL COURT IS NECESSARY TO DETERMINE IF THERE WAS IN FACT RELIANCE BY THE CITY.

That because of a letter which the plaintiffs wrote to the Mayor and the members of the City Council of the City of Cape Girardeau on August 17, 1998 (LF 276), the city asserts that

this letter amounts to “estoppel” and which therefore prevents the plaintiffs from contesting Ordinance 2403.

In its argument, in order to elevate this letter to the defense of “estoppel” preventing the plaintiffs from attacking Ordinance 2403, the only matter expressed in the plaintiffs substitute brief (page 60) other than that the letter was actually written and received is the following:

> “It is undisputed that, in debating Ordinance 2403 in the City Council, it was noted ‘that a group of hotel owners sent a letter indicating they approve of the 1% increase in the hotel tax’. L.F. at 326. The plaintiffs have never made any showing to negate the evidence showing the City’s reliance on the plaintiffs’ approval of Ordinance 2403".

Apparently, the City bases its entire defense of estoppel and its “evidence showing reliance” upon this single sentence in the proceedings of the City of Cape Girardeau where one of the councilmen stated that such a letter was received.

A municipality can only speak through its record in accord with **Fulton v. City of Lockwood**, 269 S.W.2d (Mo. 1954).

In the City’s cited authority regarding estoppel **McCain v.**

Washington, 990 S.W.2d 685, 869 (Mo. App. 1999), it is clear that this single statement as placed in the proceedings of the City Council from a letter dated August 17, 1998 (LF 276) in no way induced the City to rely on this letter in proceeding with and passing the ordinance.

In **Tinch v. State Farm Insurance Co.**, 16 S.W.3d 747, 751 (Mo. App. E.D. 2000) one of the elements of an estoppel is that there must be an action by a second party on the faith of the act of the person sought to be estopped.

As the proceedings of the City Council (LF 326) point out, the ordinance had already been prepared prior to the date of the Council proceedings and the receipt of the letter and there had been prior ordinances introduced as in those Council proceedings on August 17, 1998 wherein, it is stated that the Mayor ". . . explained the differences between the ordinance proposed at a previous council meeting and the ordinance which was being presented at this meeting".

Thus, these proceedings on August 17, 1998 passing Ordinance 2403 as Bill NO. 98-166 had been in process previously and this single letter which inspired an innocuous one sentence response from one of the councilmen can in no way constitute "estoppel" in accord with the cities authority or any authority.

As the City raises this issue as undisposed of, then the case must be returned to the trial court for a fact determination of "reliance" unless the letter cannot as a matter of law be the basis for "estoppel". The defendant through its attorneys in a letter to the trial judge on August 2, 2000 state in a sentence which begins on the second line of page two (2) of the letter:

> "The affidavit of Mr. Drury's alleged reasons for supporting the project does <u>not even purport to dispel this fact issue</u>" (estoppel). (Emphasis ours).

Thus, the defendant recognizes that the issue of reliance is a fact issue and in its substitute brief it contends the matter has not been disposed of or it is an affirmative defense not decided and the matter must be returned to the trial court if this defense of estoppel has a merit whatsoever.

Also, while the defendant contends in its brief on page sixty (60) that the plaintiffs have not negated the evidence of the City showing reliance, there is no "evidence" of reliance by the City and "estoppel" is an affirmative defense in accord with Rule 55.08 and the burden is therefore upon the City to establish reliance.

WHEREFORE, the plaintiffs pray the matter of estoppel be

determined as insufficient as a matter of law or returned to the trial court in accord with **Avidan v. Transit Cas. Co.**, 20 S.W.2d 521 (Mo. banc 2000).

CONCLUSION

For the above reasons, the defense of estoppel has no merit as a matter of law. However, if it is held that such could constitute a viable defense, then it is a matter of fact and this could only be determined by returning the case to the trial court to decide whether in fact there was reliance, assuming that the letter itself could in any way provide the basis for the defense of estoppel.

POINT VI

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO RULE UPON THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST ORDINANCE 2403 IN THE CITY OF CAPE GIRARDEAU, MISSOURI BASED UPON THE PLAINTIFFS' CONTENTION THAT ORDINANCE 2403 IMPOSED A SALES TAX AND AS SUCH, WAS REQUIRED TO INCLUDE THE TERM "SALES TAX" IN THE ORDINANCE AND AS A RESULT, THE ORDINANCE IS VOID SINCE SECTION 94.510 R.S.MO. REQUIRES THE INCLUSION OF THE TERM "SALES TAX" WITHIN THE ORDINANCE.

The plaintiffs filed their motion for summary judgment (L.F. 168) based upon plaintiffs' contention that Ordinance 2403 (LF 115) imposed a sales tax rather than a gross receipts tax and as such, was void for failure to include the words "sales tax" in the ordinance in accord with Section 94.510 R.S.Mo..

This motion was filed on May 23, 2000 and appears in the Legal File beginning at page 168 thereof and with the memorandum in support of the motion for summary judgment beginning at page 186 of the Legal File.

The defendant responded to plaintiffs' motion for summary judgment beginning at page 250 of the Legal File.

The court considered this motion in a preliminary draft of its decision and judgment and found in favor of the plaintiffs

(LF 383) but in the trial court's final judgment, there was no mention whatsoever of this motion or any disposition thereof (LF 366).

It appears that this cause must be returned to the trial court for a consideration of this issue.

The defendant has addressed this "sales tax" contention in a section of Point I of its substitute brief on page fifty-five (55) thereof denominated "6." and with the title of the amendment "Ordinance 2403 does not impose a sales tax".

In that the defendant presented arguments in opposition to the plaintiffs' contention that Ordinance 2403 imposes a sales tax and hence must have the term "sales tax" in the ordinance in accord with 94.510, we present the following arguments that in fact Ordinance 2403 does impose a sales tax and which triggers mandatory compliance with Section 94.510 and which is entirely lacking from the ordinance. (A-1 thru A-13, plaintiffs' Appendix to its substitute brief).

We set out the title to ORDINANCE 2403 and which is as follows:

> "AN ORDINANCE AMENDING CHAPTER 15 OF THE CITY CODE INCREASING AND EXTENDING THE HOTEL/MOTEL/RESTAURANT LICENSE TAX AND CALLING AN ELECTION IN THE CITY OF CAPE

GIRARDEAU, MISSOURI, ON THE QUESTION OF WHETHER TO APPROVE THOSE AMENDMENTS; DESIGNATING THE TIME OF HOLDING THE ELECTION; AUTHORIZING AND DIRECTING THE CITY CLERK TO GIVE NOTICE OF THE ELECTION"

The descriptive term "LICENSE TAX" is used in the title and in the ordinance itself referring to the type of tax which the ordinance seeks to increase and extend, and there is no mention of "sales tax" in either the title or the entire text of Ordinance 2403. (A-10 thru A-13).

As in **ACI Plastics, Inc. v. City of St. Louis**, 724 S.W.2d 513 (Mo. banc 1987), it is extremely important to determine whether or not a proposed tax is either a "license tax" or a "sales tax", and we are told near the end of column 2 on page 515 of the opinion as follows:

> "In the first place, Section 94.510 requires that *any* sales tax proposal be *clearly designated* as such. This ordinance fails to meet that minimum requirement since the term "sales tax" does not appear".

Id. (emphasis added).

The Supreme Court further concludes under note 3 near the end of the **ACI** opinion in column 2 on page 516 that one of the reasons why the ordinance was invalid

is that the title ". . . does not contain the term, '*sales* tax'".

Also, other cases including **Anderson v. City of Joplin**, 646 S.W.2d 727 (Mo. 1983) and **Suzy's Bar & Grill, Inc., v. Kansas City**, 580 S.W.2d 259 (Mo. banc 1979) point out the distinction between a sales tax and a license or "gross receipts tax".

The last two cited cases are important in that each contains a similar analysis of the difference between a sales tax and a license tax, also referred to as a gross receipts tax.

In each of those cases, the analysis is clear, that a tax assessed upon the gross receipts from retail sales of merchandise or food was a tax assessed on the amount of sale and not upon the licensee's total receipts and, as such, was not an occupational license tax, but was as a matter of law a "sales tax".

In these cases, the Supreme Court of Missouri points out that it is not and cannot be bound by what the legislative body calls a tax, but it must determine the matter from consideration of the provisions of the statute or ordinance itself. (Emphasis ours).

In the case of **Suzy's** as in our case and the **ACI Plastics** case previously cited, and also in **Anderson v. Joplin**, 646 S.W.2d 727 (Mo. 1983), a tax upon the gross revenue which a licensee receives for his merchandise (emphasis ours) is not a "gross receipts tax" nor is it a "license tax", but it is in fact, a "sales tax".

In the **Anderson** case, *supra*, the Supreme Court held in column 1 on page 728 of the opinion as follows:

> "We agree and declare Ordinance No. 80-147 to be an invalid sales tax. The meaning of the phrase "gross rental receipts derived from or paid by transient guests for sleeping accommodations" determines that the challenged ordinance imposes an invalid sales tax". (Emphasis ours).

This is exactly what City of Cape Girardeau ORDINANCE NO. 2403 does when it is stated in Ordinance No. 2403 near the bottom of the first page of the ordinance for the new tax:

> "Section 15-397. Levy of Tax
>
> There is hereby levied a license tax on hotels and motels in an amount equal to four percent (4%) of gross receipts derived from transient guests for sleeping accommodations and on caterers . . .".

In the next paragraph in the **Anderson** case, the Supreme Court discusses **Suzy's Bar & Grill** and approves it and states once again that a gross receipts tax starts with the revenue received by the licensee as a base, while a sales tax is ". . . assessed against the taxpayer as a percentage of the price of the goods".

Thus, even though the ordinance says it is taxing "gross receipts", it is still a "sales tax" if it taxes the sale of the goods or services and not overall gross revenue of the business.

These cases point out that it doesn't make any difference if the licensee pays the tax or the consumer, as is apparently often confused. But instead, it is the method of calculation of the tax that is significant, and at the bottom of column 1 on page 728 of the **Anderson** case, *supra*, another indicia of a sales tax is that a "sales tax" is assessed on the basic charge made to the customer by the merchant. This is exactly what is done in Ordinance 2403 when it imposes a four (4) percent tax on receipts from sleeping accommodations paid by transient guests.

In all of these cases the taxes were titled or labeled either license taxes or gross receipts taxes. The name given to the taxes in the ordinances was held to be irrelevant in each instance and the Supreme Court said that they were all in effect "sales taxes".

Examining the provisions of ORDINANCE 2403 in this situation, we find the following:

> "Sec. 15-397. Levy of Tax.
>
> There is hereby levied a license tax on hotels and motels in an amount equal to four (4) percent of gross receipts derived from transient guests for sleeping accommodations, and or caterers serving one hundred (100) or more people at any one function and on restaurants in an amount equal to one (1) percent of gross receipts derived from the retail sale of food prepared by the restaurant, . . .". (Emphasis ours)

Specifically, in the **Suzy's** case, although the City of Kansas City imposed a one (1) percent tax on "gross receipts from the retail sales of food", (Id. at 260) the Supreme Court held in column 2 on page 261 of the **Suzy's** opinion that since the one (1) percent Kansas City so-called "Occupational License Tax" was not assessed on all the revenue received by the licensee from the food purchasers, but only on the amount representing the gross receipts from the retail sales of food, it was a sales tax and not a gross receipts tax or a license tax.

This is precisely what is contained in the ordinance under discussion, ORDINANCE NO. 2403, in that it imposes a tax not on the gross receipts of the licensee but instead on the charge of food alone (1%) or sleeping accommodations alone (4%). This is clearly a sales tax for merchandise on services and not a license tax or a gross receipts tax on all receipts.

These cited cases go to great lengths to make this distinction which is apparently an often misunderstood concept.

These differences between gross receipts taxes and sales taxes might seem to be meddlesome distinctions, and this subject is recognized by the Missouri Supreme Court in column one on page 263 of the **Suzy's** opinion as follows:

> "The difference between a sales tax and a license tax which is prorated and itemized to a customer may or may not be significant in its actual impact. Nevertheless, the legislature by

> Section 94.510 has required that sales taxes assessed by municipalities be first approved by the electorate. As such, the legislature perceived a difference between sales taxes and other taxes, including occupational license taxes, and required the former to be submitted to the people."

In the **Suzy's** case, since it was a sales tax, and not a "gross receipts" or "license" tax, it was held invalid.

The tax imposed under Ordinance 2403 is in fact a sales tax, imposed on the act of the actual, individual sale, and not a license tax imposed on the gross receipts of a business for the privilege of engaging in that trade or business as is made clear by the last sentence of Ordinance Sec. 15-397, which states:

> ". . . but shall not apply to gross receipts derived from sales made to individuals or entities showing proof of their *exemption* from Missouri or Federal *sales taxes*."

Id. (emphasis added). The exemption of a "license" tax from sales to tax-exempt entities has no rational relationship to regulation of that occupation, but is instead rationally related to a consistent sales tax scheme.

Thus, it appears undisputable in accord with these authorities that the Cape Girardeau ordinance, ORDINANCE NO. 2403, imposes a sales tax.

Next, the question is: so what if it is a "sales tax?" There was an election anyway.

The "so what?" of this situation is that the present sales tax statute, which is 94.510, R.S.Mo. requires in accord with **ACI Plastics, Inc. v. City of St. Louis**, *supra*, the following:

> "In the first place, Section 94.510 requires that any sales tax proposal be clearly designated as such. This ordinance fails to meet that minimum requirement since the term 'sales tax' does not appear". (Emphasis ours).

Thus, the words "sales tax" must appear in the ordinance according to the **ACI Plastics** case and such is not the case in ORDINANCE NO. 2403.

We definitely have a sales tax but no mention of "sales tax" in the ordinance and therefore, in accord with **ACI Plastics, Inc.**, the ordinance and the tax are void.

In addition to the comments made by the Supreme Court of Missouri in the **Suzy's Bar & Grill** case, in the **ACI Plastics, Inc.** case, column 2 on page 516, with regard to this type of case, the Supreme Court stated as follows:

> "The City Sales Tax Act requires that a sales tax be passed in a prescribed manner and the Board did not comply".

Thus, as the bottom line of this particular point, the Cape Girardeau tax levy is clearly a sales tax since it is imposed on the merchandise and the service rather than on the gross receipts of the licensee even though the term "gross receipts" is used. As held by the Supreme Court of Missouri in the cited cases, that term is meaningless and it is the

actual imposition of the tax that counts. Thus, the tax of ORDINANCE NO. 2403 being a sales tax, the term "sales tax" had to appear in the ordinance as held in the **ACI Plastics** case, *supra*, to be as a "minimum requirement" of Section 94.510 R.S.Mo., and Ordinance 2403 does not reach this "minimum requirement" and it is invalid.

CONCLUSION

Ordinance 2403 is clearly a "sales tax" ordinance as held by the Supreme Court of Missouri in **Anderson v. Joplin**, *supra*, on identical facts.

ACI Plastics, *supra*, also decided by the Supreme Court of Missouri (En Banc) says that in the instance of a sales tax ordinance, the words "sales tax" must appear in the ordinance as a "minimum requirement" under Section 94.510 (City Sales Tax Law).

The ordinance does not refer to "sales tax" either in its title or anywhere in the ordinance.

As a result, Ordinance 2403 is invalid.

POINT VII

THE DEFENDANT ERRONEOUSLY CONTENDS IN SECTION E OF ITS SUPPLEMENTAL BRIEF ON PAGE FORTY-SIX (46) THAT PLAINTIFFS CANNOT PREVAIL ON THEIR CLAIM THAT THE ELECTION HELD TO APPROVE ORDINANCE 2403 IS INVALID. THE GIST OF THE DEFENDANT'S ARGUMENT SEEMS TO BE THAT EVEN IF THE PLAINTIFFS' ARGUMENT REGARDING THE FAILURE OF ORDINANCE 2403 TO ABIDE BY THE PROVISIONS OF CHARTER SECTION 3.14(a) CONCERNING THE CLEAR TITLE AND SINGLE SUBJECT REQUIREMENTS IS UPHELD IN THIS APPEAL AS IT WAS IN THE TRIAL COURT, THAT THE ORDINANCE SHOULD BE SEVERED AND THOSE PROVISIONS RELATING TO THE TAX AND THE ELECTION PROVIDED FOR IN THE TITLE OF THE ORDINANCE SHOULD BE UPHELD. THIS IS APPARENTLY BASED ON SECTION 115.577 R.S.MO. THAT AN ELECTION CONTEST MUST BE BROUGHT WITHIN THIRTY (30) DAYS AFTER THE OFFICIAL ANNOUNCEMENT OF THE ELECTION RESULT TO NEGATE AN ELECTION. SUCH IS NOT THE CASE IN THIS SITUATION AS THE ELECTION AND THE ORDINANCE TITLE AND THE OTHER PROVISIONS THEREOF ARE DEPENDENT UPON ONE AND THE OTHER AND A VOID

ORDINANCE NEGATES THE ELECTION EVEN IF THE ELECTION IS MENTIONED IN THE TITLE.

The defendant in its Section E. of Point I states that the election held pursuant to Ordinance 2403 should be declared valid although other portions of the ordinance such as the City's participation in the University project and the bond issue as contained in Sections 7 and 8 of Ordinance 2403 may be invalid.

In the first instance, there is no mention whatsoever in Point Relied On I of the defendant's substitute brief on page twenty-two (22) thereof of this argument set out as Section E. on page forty-six (46) of the defendant's substitute brief concerning the defendant's contention that the plaintiffs should have brought the action within thirty (30) days to attempt to negate the election under Ordinance 2403 and that as a result portions of Ordinance 2403 should be severed in the event that the trial court's decision is upheld. This contention is entirely absent from defendant's Point Relied On I.

In accord with Rule 84.04 and **Unlimited Equipment Lines, Inc. vs. Graphic Arts Centre, Inc.**, 889 S.W.2d 926 (Mo. App. E.D. 1994) it is held that a court of appeals does not review errors raised in the argument section of an appellate brief which are not set out in the point relied on as found in the foot note at the bottom of page 932 of the opinion citing **Landoll by Landoll v. Dovell**, 779 S.W.2d 621, 627 (Mo. App. 1989).

Secondly, while Section 115.577 R.S.Mo., requires that an election contest be filed

within thirty (30) days after the official announcement of the election result, the plaintiffs do not seek to dispute the results of the election as to the numerical votes cast for and against the proposition nor do plaintiffs allege fraud or any other matter commonly associated with election contests nor the ballot wording.

In the substitute brief of the defendant, the defendant states that if the trial court's decision be upheld with regard to Ordinance 2403, then the provisions thereof concerning the election should be severed and held to be valid even though other portions of the ordinance might be held to be invalid.

Such a severance in this situation is not proper in accord with **Levinson v. City of Kansas City**, 43 S.W.3d 312 (Mo. App. 2001), which holds that if an ordinance is in violation of a state statute then the ordinance is ". . .void and unenforceable ab initio". This was held to occur regardless of approval by the voters of the ballot proposition. This holding is found in column 2 on page 320 of the decision. In our case, as we are dealing with the requirements of the Charter of the City of Cape Girardeau, we wish to call the court's attention to the gravity of the City Charter provisions and in accord with **State ex rel. Childress v. Anderson**, 865 S.W.2d 384, 387 (Mo. App. 1993), "the home rule charter is the city's organic law and its Constitution. (Emphasis ours).

Thus, Section 3.14(a) of the Charter of the City of Cape Girardeau is in essence the "Constitution" of the City and should be strictly construed.

WHEREFORE, there is no way to separate or sever portions of an ordinance and

determine which of its parts are void and which are not when it is in fact violative of Section 3.14(a) of the requirements of the Charter of the City of Cape Girardeau.

As a result, the argument of the City regarding severance of various provisions of the argument is without merit.

POINT VIII

ARGUMENT

THE DEFENDANT HAS IN ITS SUBSTITUTE BRIEF IN SECTION 3. OF POINT RELIED ON I AN ARGUMENT (PAGE 42) ENTITLED “THE OPINION OF

THE COURT OF APPEALS WAS ERRONEOUS". THIS IS AN IMPROPER ARGUMENT TO BE INCLUDED BY THE DEFENDANT IN ITS BRIEF AS THE OPINION OF THE MISSOURI COURT OF APPEALS HAS NO PRECEDENTIAL AUTHORITY SINCE AN APPEAL TO THIS COURT UPON TRANSFER IS TAKEN AS IF ORIGINALLY APPEALED TO THIS COURT.

References to the decision Missouri Court of Appeals by the City are obviously improper in accord with **Buchweiser v. Estate of Laberer**, 695 S.W.2d 125 (Mo. banc 1985). This case holds that a review of a case upon transfer from the court of appeals to this court is taken as though the case was originally appealed to the Supreme Court. The authorities cited are **Mo. Const. Art. V, Section 10;** and Rule 83.03. Also, in accord with **Gerlach v. Missouri Commission on Human Rights**, 980 S.W.2d 589 (Mo. App. E.D. 1998), a court of appeals decision has no precedential effect if the case is transferred.

CONCLUSION

In the "CONCLUSION" of the brief of the defendant beginning on page sixty-one (61) thereof, the defendant states as follows:

> "The plaintiffs have failed to carry the high burden that the law places upon them in this case. This Court's cases, all of

> recent vintage, demonstrate that single subject/clear title challenges to legislation are not favored, and that plaintiffs bear the substantial burden of showing that the legislation ***clearly*** and ***undoubtedly*** violates the limitation."

The above pronouncement by the defendant regarding the "high burden" which the defendant says we have totally ignores the applicable rule with regard to taxing legislation and particularly, as it was held by the Missouri Supreme Court in 1978 in **Adams v. City of St. Louis**, 563 S.W.2d 771 (Sup. Ct. 1978), at the top of column 1 on page 775 of the opinion that:

> "Because the ordinance in a taxing measure, a strict interpretation of its terms is required. It is to be construed against the taxing authority and in favor of the taxpayer". (Several authorities are cited).

Also, importantly, upon page fifty-seven (57) of its brief, the defendant also cites Rule 84.14 which proscribes the various alternatives which are available to an appellate court upon appeal and presumably the scope for the appellate court is wider in a non-jury setting. However, this rule does not stand for the proposition that an appellate court may decide questions of fact. We treat the estoppel issue raised by the City in POINT V of our brief and if this court feels that as a matter of law "estoppel" is available to the defendant based upon the points which the defendant makes in its brief, then the issue

of "reliance" remains undecided and unestablished and upon which the defendant has the burden of proof. In this instance, the case must necessarily be returned to the trial court for a determination of "reliance" by the City unless this court determines that this defense is not available to the defendant as a matter of law and which the plaintiffs feel is the case.

Also, coming within this area of still undecided questions in the trial court is the issue regarding whether or not Ordinance 2403 is in fact a "sales tax" as we (plaintiffs) urge in POINT VI of our brief which was presented in the trial court but not treated in the trial court's judgment. It may well be that this controversy is strictly a matter of law which this court can determine.

However, contrary to the defendant's assertions at the bottom of page fifty-seven (57) of its brief, Rule 84.14 does not provide that an appellate court can ". . .give such judgment as the trial court ought to have given" if there is still an undecided fact question, **Steinmeyer v. Steinmeyer**, 699 S.W.2d 65, 68 (Mo. App. 1984).

WHEREFORE, the plaintiffs pray that if this court finds unresolved matters to be determined by the trial court, then the case be remanded accordingly or in the alternative, that the judgment of the trial court be upheld in favor of the City upon one or more of those points regarding which the plaintiffs' seek summary judgment.

_____

Respectfully submitted,

LOWES & DRUSCH

By: _____

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RULE 84.06 CERTIFICATE

1. a. The undersigned certifies pursuant to Rule 55.03(a) that this brief is signed by at least one attorney of record in the attorney's individual name. The signer's address, Missouri bar number, and telephone number are as follows:

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The undersigned certifies that this brief is not verified

or accompanied by affidavit.

b. The undersigned certifies pursuant to Rule 55.03(b) to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that: (1) the matters set forth in its brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the matters set forth in this brief are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c. The undersigned certifies pursuant to Rule 55.03(c) that this brief does not seek sanctions.

2. The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b).

3. Relying on the word and line count of the word-processing system used to prepare this brief, the undersigned

certifies that this brief contains 18493 words and 2108 lines of text.

4. Pursuant to Rule 84.06(g), the undersigned certifies that the disks containing this brief that are filed with the court and served on the parties have been scanned for viruses and that they are virus-free.

CERTIFICATE OF SERVICE

The undersigned hereby certified that two copies of “SUBSTITUTE BRIEF OF RESPONDENTS, JAMES L. DRURY, ET AL" were served upon the attorney for the appellants by via Federal Express, on the 14th day of November, 2001 to:

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Also a copy has been via United States mail, first class, postage prepaid to each

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Subscribed and sworn to before me this 14th day of November, 2001.

_____
Sherri L. Garrard

My Commission Expires: November 15, 2002

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APPENDIX INDEX